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September 25, 1998

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
1919 M Street, NW  
Room 222  
Washington, DC 20554

Re: *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, CC Docket No. 98-147  
Comments of Transwire Communications, Inc.

Dear Ms. Roman Salas:

Pursuant to section 1.419(b) of the Commission's rules, transmitted herewith, on behalf of Transwire Communications, Inc., are an original and four (4) copies of its comments in the above-referenced proceeding. Also enclosed is a copy of these comments on diskette formatted in WordPerfect 5.1 for Windows.

In addition, enclosed is a confirmation copy of this filing marked "Stamp In." Please date stamp this copy and return it to the courier delivering this package.

Should any question arise concerning this filing, please contact the undersigned attorney directly.

Sincerely,

  
Randall B. Lowe  
Counsel for Transwire Communications, Inc.

Enclosures

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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**SEP 25 1998**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

**In the Matter of**

**Deployment of Wireline Services Offering  
Advanced Telecommunications Capability**

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**CC Docket No. 98-147**

**COMMENTS OF TRANSWIRE COMMUNICATIONS, INC.**

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Dated: September 25, 1998

## **SUMMARY OF THE ARGUMENT**

Transwire Communications, Inc. ("Transwire") is an advanced telecommunications services company whose mission it is to build, operate and maintain a state-of-the-art, high-speed, digital, meshed telephone and data communications network, featuring Northern Telecom's Consumer Digital Modem ("CDM") technology. In Transwire's opinion, the goals of Section 706 of the 1996 Act can best be achieved by developing a truly competitive market place and a regulatory environment that is conducive to technological innovation, capitalization and market investment in advanced telecommunications capability and services. The Commission has already taken appropriate steps to implement the pro-competitive goals of the 1996 Act; namely, by subjecting incumbent LECs to the interconnection and unbundled access obligations of the 1996 Act with respect to both their circuit-switched and packet-switched networks, by determining that it will not forbear from applying the requirements of sections 251(c) and 271 with respect to advanced services, and by denying requests to create a single, global LATA for packet-switched services. While these measures will greatly enhance the timely deployment of advanced telecommunications capability and services, Transwire believes the Commission must still go further to facilitate rapid deployment, foster fair competition, and encourage technological advancement.

In particular, the Commission should require that incumbent LECs only offer advanced telecommunications services through a separate subsidiary and on a resale basis to competitors. In order to address anticompetitive concerns, the Commission should also require that the separate subsidiary be subject to heightened regulations, including restricting the subsidiary's access to funding from its incumbent LEC parent.

Furthermore, to enable competitive LECs to achieve their full potential in deploying advanced communications capability, the Commission should fully implement detailed rules to require incumbent LECs to provide nondiscriminatory collocation, collocation of cost-efficient integrated equipment, and the timely ordering and provisioning of collocation space. The Commission should also guarantee the preservation and protection of the existing copper wire infrastructure and ensure unbundled access to the incumbent LECs' copper loop to encourage the full realization of emerging copper-based technologies. Without such access and plant protection, Transwire and other companies seeking to deploy CDM, xDSL and other technologies to enhance the quality and variety of telecommunications services available to the public, will be locked out of the marketplace.

In addition to these safeguards, Transwire strongly recommends that the Commission adopt a national policy to assure access to the local loop at any technically feasible point and nondiscriminatory access to OSS systems for loop ordering and provisioning. The Commission must also make certain that incumbent LECs are required to offer for resale the advanced services they generally offer to non telecommunications carriers, and should not, under any circumstances, modify LATA restrictions currently imposed on BOCs.

Transwire applauds the efforts of the Commission to promote competition in local markets and to eliminate existing barriers to the deployment of advanced telecommunications capability and services. However, without the full implementation of the foregoing safeguards, Transwire and other potential competitive providers of advanced telecommunications capability and services, will be handicapped by the monopoly access network practices of incumbent LECs, and ultimately ineffectual in their efforts to offer ubiquitous, lower-cost advanced capability and services in the immediate future.

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<b>In the Matter of</b>	)	
	)	
<b>Deployment of Wireline Services Offering</b>	)	<b>CC Docket No. 98-147</b>
<b>Advanced Telecommunications Capability</b>	)	

**COMMENTS OF TRANSWIRE COMMUNICATIONS, INC.**

Transwire Communications, Inc. ("Transwire"), by and through its attorneys, hereby submits its comments on the Commission's Notice of Proposed Rulemaking in the above-referenced proceeding concerning the deployment of wireline services offering advanced telecommunications capability.<sup>1</sup>

**I. INTRODUCTION**

The Commission's *NPRM* and companion Memorandum Opinion and Order ("*Order*") were issued in response to six Petitions filed, pursuant to Section 706 of the Telecommunications

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<sup>1</sup> See *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et. al.*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Docket Nos. 98-147, *et al.*, FCC 98-188 (released August 7, 1998) ("*NPRM*").

Act of 1996 (the "1996 Act"),<sup>2</sup> which concern various regulatory issues pertaining to the provisioning of advanced telecommunications capability. In its *NPRM*, the Commission proposes measures to promote the deployment of wireline services offering advanced telecommunications capability. Specifically, in the *NPRM*, the Commission (i) proposes an optional alternative pathway for incumbent local exchange carriers ("incumbent LECs") that would allow separate affiliates to provide advanced services free from incumbent LEC regulation; (ii) proposes rules intended to ensure that all entities seeking to offer advanced services have adequate access to local loops and collocation arrangements; (iii) seeks comment on ways to modify the section 251(c) unbundling requirements once companies are in compliance with the rule changes; and (iv) seeks comment on measures that would provide BOCs with targeted interLATA relief to ensure that all consumers, even those in rural areas, are able to reap the benefits of advanced telecommunications capability.

In sum, through the instant proceeding, the Commission takes steps to implement the pro-competitive goals of the 1996 Act with respect to advanced services and "to ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers."<sup>3</sup> Indeed, in the *NPRM* and *Order*, the Commission cites the 1996 Act as providing the blueprint

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<sup>2</sup> See Pub. L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, codified at 47 U.S.C. § 157 note (1996). The 1996 Act is codified at 47 U.S.C. §§ 151 *et seq.*

<sup>3</sup> See *NPRM* at ¶¶ 1-2.



for promoting the speedy deployment of new telecommunications technologies, including advanced services.<sup>4</sup>

**A. Summary of Transwire's Operations**

Transwire is keenly concerned with ensuring the timely deployment of advanced telecommunications capability through a competitively-neutral marketplace, particularly with regard to guaranteeing adequate access to copper loops and collocation arrangements. Like other competitors in the advanced telecommunications services industry, Transwire was formed in response to the 1996 Act to provide telecommunications services to meet the exploding demand for bandwidth. Transwire is an advanced telecommunications services company whose mission is to build, operate and maintain a state-of-the-art, high-speed, digital, meshed telephone and data communications network, featuring Northern Telecom's ("Nortel") Consumer Digital Modem ("CDM") technology. CDM technology is a high-speed asynchronous digital offering that provides a secure, "always up" connection of 1 Mbps "downstream" to the end user and 320 kbps "upstream" from the end user over the existing copper wire telephone infrastructure. These speeds are roughly eight times faster than prevailing dual-channel Integrated Service Digital Network ("ISDN") products and seventeen times faster than the popular 56 kbps modems being used today.

With the CDM technology, Transwire utilizes the existing copper wire telephone infrastructure to provide customers with both local and long-distance telephone services and reliable high-speed access to the Internet, corporate "intranets" and Transwire's own "extranet."

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<sup>4</sup> See *id.* at ¶ 1.

Customers can use this copper wire connection for simultaneous telephone and fax communications while still connected to the Internet, an intranet, or Transwire's extranet. The combination of dependable telephone services and high-speed data communications will allow Transwire to provide its customers a portfolio of faster, more effective, comprehensive and dependable network communications environments than currently available in the telephone/data services market.

Transwire believes that the quick-to-market CDM technology represents an immediate, cost-effective solution for bridging the "last mile" of transmission from the fiber network points-of-presence or "POPs" to the customer's premises, where most data communications networks presently bog down. CDM fills the gap between current limited speed analog modems and very high-speed, but higher cost and more difficult to implement, digital subscriber line technologies ("xDSL") (See Exhibit A).

In addition to its efficiency and reduced cost to the consumer, CDM technology offers truly ubiquitous service. CDM is designed to operate over existing non-loaded loops without specialized engineering, loop extensions or remote access vehicles. In essence, CDM technology transforms the existing copper plant into high-speed, data-over-voice loops and thus enables Transwire to offer 100 percent ubiquitous service while at the same time protecting the copper plant. In addition, as discussed below in more detail, because CDM technology can transmit signals using two-wire analog loops, the technology is no more intrusive than ISDN with regard to interference. If provided with the appropriate loops, Transwire can offer technology at a cost not markedly different than the cost of providing ISDN services.

**B. Summary of Transwire's Position**

As an initial matter, Transwire supports the Commission's findings in the *Order*, which clarified the Commission's views on the applicability of existing statutory requirements in sections 251 and 271 of the 1996 Act.<sup>5</sup> Specifically, Transwire agrees that (i) incumbent local exchange carriers ("incumbent LECs") are subject to the interconnection obligations of section 251(a) and (c)(2) of the Act with respect to both their circuit-switched and packet-switched networks;<sup>6</sup> (ii) incumbent LECs are subject to the unbundled access obligations set forth in section 251(c)(3), and the facilities and equipment used by incumbent LECs to provide advanced telecommunications services are network elements;<sup>7</sup> and (iii) the Commission was correct in denying the petitions of several of the regional Bell operating companies<sup>8</sup> to the extent such petitions requested the Commission to forbear from applying the requirements of sections 251(c) and/or 271 with respect to the provision of advanced services.<sup>9</sup>

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<sup>5</sup> See *id.* at ¶ 32.

<sup>6</sup> See *id.* at ¶ 11.

<sup>7</sup> See *id.*

<sup>8</sup> *Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-11 (filed January 26, 1998); *Petition of US West Communications, Inc., for Relief from Barriers to Deployment of Advanced Telecommunications Services*, CC Docket No. 98-26 (filed February 25, 1998); *Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability*, CC Docket No. 98-32 (filed March 5, 1998); *Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service*, CC Docket No. 98-91 (filed June 9, 1998).

<sup>9</sup> See *id.* at ¶ 12.

Transwire also believes that the bulk of the Commission's proposed policies set forth in its *NPRM*, including policies addressing access to collocation and loops, and unbundling and resale obligations, will promote continued technological innovation and deployment of advanced telecommunications capability by companies such as Transwire. In fact, the success of Transwire and the ability to use CDM technology hinges on access to the existing copper wire telephone infrastructure. As discussed more fully herein, without such access, provisioned on a fair, reasonable and non-discriminatory basis, Transwire and other companies seeking to deploy this breakthrough technology to enhance the quality and variety of telecommunications services and products available to the public will be locked out of the marketplace.

In order to address certain anti-competitive practices in the current marketplace, Transwire believes that the Commission should require incumbent LECs to offer advanced telecommunications services through a separate affiliate and require that affiliate to offer its services to requesting carriers for resale at wholesale rates. Moreover, Transwire contends that the Commission should also impose certain limitations on the advanced services affiliate, including restricting the affiliate's access to funding from the incumbent LEC's parent. Furthermore, to enable competitive LECs to achieve their full potential in deploying advanced telecommunications capability, the Commission should fully implement detailed rules ensuring access to the collocation arrangements and copper loops necessary for competitors to provide advanced services.

In sum, the deployment of advanced telecommunications capability, at efficiencies capable of supporting widespread consumer acceptance of advanced services, is the wave of the future. In these Comments, Transwire demonstrates that in order to encourage the near-term deployment of advanced telecommunications capability, the Commission must fully implement

the interconnection, collocation, unbundling and resale requirements set forth in the 1996 Act. Heeding its unequivocal statutory mandate, the Commission should undertake only those actions that foster fair competition and technological advancement.

## **II. PROVISION OF ADVANCED SERVICES THROUGH A SEPARATE AFFILIATE**

### **A. Background**

In the *NPRM*, the Commission proposes an "optional alternative pathway" that would allow incumbent LECs to provide advanced services through (i) separate affiliates free from incumbent LEC regulation, or (ii) on an "integrated basis," and therefore subject to the requirements of section 251(c).<sup>10</sup> Under the Commission's proposal, an affiliate that is truly separate from the incumbent LEC would not be deemed an incumbent LEC and, therefore, would not be subject to the incumbent LEC regime established by Congress in section 251(c).

It is unknown at this time what incumbent LECs will do when faced with the "business decision"<sup>11</sup> of offering advanced telecommunications services directly or through a separate affiliate. It is likely, however, that certain incumbent LECs will elect to continue to provide advanced services themselves rather than establish a separate affiliate. Transwire submits that allowing the incumbent LECs to continue to offer advanced services will in no way curb the

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<sup>10</sup> *Id.* at ¶¶ 19, 37.

<sup>11</sup> *Id.* at ¶ 86 ("[s]imply put, each incumbent LEC *Seeking* to provide advanced services must make a business decision as to whether it wishes to provide such services free of section 251(c) requirements").

abuses inherent in the current system where the requisite network resides solely with one competitor -- the incumbent LEC.

Transwire therefore recommends that the Commission adopt a policy such that an incumbent LEC may offer advanced telecommunications services only through a truly separate subsidiary. For purposes of preserving the provisioning of advanced services on a resale basis, The Commission should rely on its plenary statutory authority to require the advanced services subsidiary to offer its services for resale to requesting carriers at wholesale rates. Moreover, given that an incumbent LEC's advanced services affiliate will inherit certain competitive advantages by virtue of its relationship with the incumbent LEC, Transwire recommends that advanced services affiliates be subject to a higher level of regulation than other competitive local exchange carriers ("competitive LECs") during the period of transition to a competitive marketplace.

1. Allowing incumbent LECs to offer advanced telecommunications services on an integrated basis does nothing to deter the anti-competitive practices of the incumbent LECs.

The *NPRM* seems to presuppose that, if given the choice, incumbent LECs will elect to offer advanced services through a separate affiliate. Transwire suggests that this supposition is, at best, less than certain. Given that incumbent LECs have been successful under the current regulatory regime at locking out competition by locking in the network and collocation arrangements necessary to provide advanced services, incumbent LECs may choose to continue to provide advanced telecommunications services on an integrated basis. Allowing incumbent LECs to continue to offer advanced services directly will in no way curb the anti-competitive practices which impede competition in the advanced services market.

The current marketplace is rife with examples of the anticompetitive practices of incumbent LECs. Competitors complain, for example, that they cannot get DSL-compatible loops from incumbent LECs on reasonable terms and on a timely basis,<sup>12</sup> and that incumbent LECs routinely respond with “no space” assertions to requests for physical collocation.<sup>13</sup> Competitors also allege that incumbent LECs often refuse to interconnect their local data networks with those of competitors.<sup>14</sup> Last, but certainly not least, evidence abounds that incumbent LECs frequently ignore the Commission’s directive to provide nondiscriminatory access to their operations support systems (“OSS”).<sup>15</sup>

Indeed, the Motions for Reconsideration of the *Order* filed by certain Bell operating companies (“BOCs”) make clear their intention to continue to wage the war to impede access to their networks by competitors.<sup>16</sup> Transwire believes that a properly implemented separate

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<sup>12</sup> See, e.g., *Reply Comments of DSL Access Telecommunications Alliance*, CC Docket Nos. 98-11, 98-26, 98-32, at 11 (filed May 6, 1998); *Comments of Covad Communications Co.*, CC Docket Nos. 98-11, 98-26, 98-32, at 8-9 (filed April 6, 1998) (“*Covad Comments*”); *Comments of AT&T Corp.*, Docket Nos. 98-11 at 16-19; 98-26 at 7-9; and 98-32 at 10-11 (filed April 6, 1998).

<sup>13</sup> See, e.g., *Covad Comments* at 13-15 (“Covad has generally found that in as many as 15-20% of the central offices it seeks to collocate in – even and especially among residential offices in which Covad would be the first collocator – incumbent LECs claim that no space is available for physical collocation.”)

<sup>14</sup> See *Petition of the Association for Local Telecommunications Services for a Declaratory Ruling*, CC Docket No. 98-78 (filed May 27, 1998) (“*ALTS Petition*”) at 12-14. Transwire also contends that certain incumbent LECs are bundling their services with a selected ISP, in an effort to shut out competition.

<sup>15</sup> See, e.g., *ALTS Petition* at 22-24.

<sup>16</sup> See *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Petition of Bell Atlantic for Partial Reconsideration or, Alternatively, for Clarification, CC Docket No. 98-147 (filed September 8, 1998); *In the Matter of Deployment of*

(footnote continued to next page)

affiliate construct, attendant with the non-discrimination requirement, will assist in alleviating this problem. That is, an incumbent LEC has an incentive to open its network to its advanced services affiliate to the extent necessary to allow its affiliate to offer advanced services. Under the separate affiliate model proposed by the Commission--where incumbent LECs are required to treat all competitive LECs the same, including the incumbent LECs advanced services affiliate<sup>17</sup> - other competitors, at least in theory, would be entitled to the same access to the incumbent LECs' network as the advanced services affiliate. In contrast, under the current regulatory regime, incumbent LECs have no incentive to open their networks to anyone and therefore have resisted doing so.<sup>18</sup>

Although a separate affiliate model may not be the perfect fix to the problem -- and certainly will be difficult to enforce -- Transwire believes that it is the preferable means by which

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*(footnote continued from previous page)*

*Wireline Services Offering Advanced Telecommunications Capability*, Petition for Reconsideration of SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell, CC Docket No. 98-147 (filed September 8, 1998).

<sup>17</sup> A central tenet of the Commission's proposal is that, to be free of incumbent LEC regulation, an advanced services affiliate must function just like any other competitive LEC and not derive unfair advantages from the incumbent LEC. *See NPRM* at ¶ 96.

<sup>18</sup> The Commission must be certain, however, that its separate affiliate construct in no way impedes the deployment of technologies that are efficiently designed to be integrated into the existing public switched telephone network ("PSTN") switching infrastructure. The CDM technology utilized by Transwire is such an integrated technology. With regard to any separation of switching facilities and operations, the Commission must ensure that the incumbent LEC and its advanced services affiliate are able to deploy high-speed data line equipment on the LEC's switch. Given that these integrated technologies use the existing infrastructure already in place in the copper loop plant, they allow for more cost-effective deployment. As such, the Commission must ensure that its separate affiliate proposal does not in any way impede the deployment of integrated technologies.



to promote fair competition for advanced telecommunications services.<sup>19</sup> Left to their own devices, the incumbent LECs are likely to engage in the same types of behavior which led us to where we are today--competitors and would-be competitors struggling to gain access to the facilities necessary to compete in the advanced telecommunications services market. For these reasons, Transwire recommends that the Commission mandate that incumbent LECs be permitted to provide advanced services only through a separate affiliate.

2. The Commission should require incumbent LECs' advanced services affiliates to offer their advanced telecommunications services which they offer to competitors for resale at wholesale rates.

It is critical that the Commission not only encourage the deployment of facilities necessary to provide advanced telecommunications, but also promote the offering of advanced services on a resale basis. To this end, Transwire posits that it is necessary for the Commission to extend the incumbent LECs' obligation under section 251(c)(4) to their advanced services affiliates. That is, the Commission must preserve the ability of competitive LECs under section 251(c)(4) to purchase from incumbent LECs (or their affiliates) advanced telecommunications services for resale at wholesale rates.

Section 251(c)(4) obligates incumbent LECs to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not

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<sup>19</sup> Transwire also notes for the record two other options--requiring total incumbent LEC divestiture of advanced telecommunications assets and services or prohibiting incumbent LECs from offering advanced telecommunications service.

telecommunications carriers.<sup>20</sup> Under the Commission's separate affiliate proposal, the advanced services affiliate, rather than the incumbent LEC, would provide advanced services at retail to end users. To foreclose the possibility of a claim that this construct does not accommodate the requirement that incumbent LECs offer their advanced telecommunications services for resale at wholesale rates,<sup>21</sup> Transwire urges the Commission to affirmatively extend the obligations of section 251(c)(4) to the incumbent LECs' advanced services affiliates.

Transwire submits that the Commission has statutory authority to require the incumbent LECs' advanced services affiliates to offer advanced services for resale at wholesale rates. Sections 4(i),<sup>22</sup> 201(b),<sup>23</sup> and 303 (r)<sup>24</sup> of the 1996 Act authorize the Commission to adopt any

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<sup>20</sup> Section 251(c)(4) provides, in pertinent part, that "each incumbent local exchange carrier has the following duties: . . .

(4) RESALE. – The duty – (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service."

47 U.S.C. § 251(c)(4) (1996). The Commission has ruled that advanced telecommunications services, to the extent they are local exchange services, are subject to the incumbent LECs' obligations under section 251(c). *NPRM* at ¶¶ 35-64.

<sup>21</sup> For instance, an incumbent LEC may claim that because it will be offering advanced services at retail through its separate affiliate, which will be treated as a competitive LEC and therefore not subject to the obligations of section 251(c)(4), it is under no obligation to offer advanced services for resale to requesting carriers at wholesale rates.

<sup>22</sup> Section 4(i) of the Act provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154 (i) (1996).

<sup>23</sup> Section 201(b) of the Act provides, in pertinent part, that the "Commissioner may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 47 U.S.C. § 201(b) (1996).

rules it deems necessary or appropriate in order to carry out its responsibilities under the Act.<sup>25</sup> Moreover, courts have routinely held that the Commission's general rulemaking authority is "expansive" rather than limited,<sup>26</sup> and that the Commission has the authority to adopt rules to administer congressionally mandated requirements.<sup>27</sup>

Requiring incumbent LECs' advanced services affiliate to offer their advanced telecommunications services for resale at wholesale rates is not inconsistent with the Act, which expressly requires the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" and to take action "to

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<sup>24</sup> Section 303(r) of the Act grants the Commission, *inter alia*, the power to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . ." 47 U.S.C. § 303(r) (1996).

<sup>25</sup> See also *In the Matter of Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, FCC 96-489, at ¶ 23 (released December 24, 1996) ("*Non-Accounting Safeguards Order*"), *Order on Reconsideration*, 12 FCC Rcd. 2297 (1997), *recon. ending, petition for summary review in part denied and motion for voluntary remand granted sub nom., Bell Atlantic v. FCC*, No. 97-1067 (D.C. Cir.) (filed March 31, 1997), *Second Order on Reconsideration*, 12 FCC Rcd. 8653 (1997), *aff'd sub nom., Bell Atlantic Telephone Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), *Second Report and Order*, 12 FCC Rcd. 15756 (1997). See also *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-03 (1956) (stating that the Commission has the unquestioned and broad authority to modify its rules to serve the "public interest" as long as such modifications "are reconcilable with the Communications Act as a whole").

<sup>26</sup> See *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943) (" . . . the Act gave the Commission not niggardly but expansive powers"); *FCC v. Nat'l Citizens Comm. For Broadcasting*, 436 U.S. 775, 796 (1978) (" . . . so long as the regulations are not an unreasonable means . . . to achieve [a statutory goal], they fall within the general rulemaking authority . . .").

<sup>27</sup> See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) (administrative decisions, unless arbitrary or capricious, should be given deference if "based on a permissible construction of the statute"); *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) ("The power of an

(footnote continued to next page)

accelerate deployment of such capability by . . . promoting competition in the telecommunications market.”<sup>28</sup> Moreover, it is clearly in the public interest to encourage the wide-spread provisioning of advanced telecommunications services through resale. In sum, an incumbent LEC which provides advanced telecommunications services through a separate affiliate should not be released of its obligation under section 251(c)(4) to provide advanced services for resale at wholesale rates.<sup>29</sup>

The importance of resale in cultivating the wide-spread availability of advanced services should not be minimized. The growth of the resale industry in the long distance market is illustrative. Industry data reflects that resale is the fastest growing segment of the long distance market.<sup>30</sup> In 1996, revenues from wholesale minutes were \$7.2 billion, making resellers one of

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(footnote continued from previous page)

administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress”).

<sup>28</sup> See 47 U.S.C. § 157 note (1996).

<sup>29</sup> In this regard, Transwire disputes the Commission’s tentative finding in the *NPRM* that imposing the obligations of section 251(c) of the Act upon the advanced services affiliate is contrary to the Act, insofar as such obligations only apply to incumbent LECs. *NPRM* at ¶ 94. Transwire posits that the Commission’s proposal to allow incumbent LECs to offer advanced telecommunications services through a separate affiliate, coupled with its position that the obligations of section 251(c) apply only to incumbent LECs, as defined in the Act, may undermine one of the principal tenets of the Act--the ability of competitive LECs under section 251(c)(4) of the Act to purchase advanced telecommunications services for resale at wholesale rates.

<sup>30</sup> See [http://www.tra.org/telecom\\_resale/history.html](http://www.tra.org/telecom_resale/history.html) (citing a report by ATLANTIC-ACM, a Boston-based consulting firm, which reflects an estimated compound annual growth rate of 14.9 percent from 1993-1998).

the largest purchasers of long distance services from major, facilities-based carriers.<sup>31</sup> The reason is simple: resale allows quick entry and provides carriers with the ability to offer services where they do not have facilities, thus providing the benefits of competition to a greater constituency. In the process, resale exerts downward pressure on rates, bringing them more in line with the underlying costs of service.

In sum, the purchase of advanced telecommunications services for resale solely at retail rates<sup>32</sup> undercuts the pro-competitive requirements of the Act and could serve to impede the availability of advanced telecommunications services. The Commission must therefore preserve the right of competitive LECs to purchase advanced telecommunications services for resale at wholesale rates.

## **B. Advanced Services Affiliates**

1. Given the inherently unique relationship between incumbent LECs and their advanced services affiliates, a higher level of regulation is necessary and justified.

Although Transwire advocates the mandatory creation of a separate subsidiary for the provision of advanced services by incumbent LECs', Transwire believes that the Commission must be mindful that there remain anticompetitive concerns associated with the operation of an

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<sup>31</sup> See [http://www.tra.org/telecom\\_resale/facts\\_figures.html](http://www.tra.org/telecom_resale/facts_figures.html) (citing a report by ATLANTIC-ACM, a Boston-based consulting firm).

<sup>32</sup> See 47 U.S.C. § 251 (b)(1) (1996) ("OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS – Each local exchange carrier has the following duties: (1) RESALE. – The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services."). The Commission states that the affiliate would remain subject to the

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advanced services affiliate. Given the inherently unique relationship between the incumbent LEC and its separate affiliate, the Commission must be vigilant in ensuring that its rules foster an environment in which an incumbent LEC's affiliate is truly separate and distinct from the incumbent LEC.

In the *NPRM*, the Commission sets forth certain structural separation and nondiscrimination requirements with which the incumbent LEC would need to comply in order to establish an advanced services affiliate that would not be deemed an incumbent LEC. Although Transwire supports the principles underlying each structural separation and nondiscrimination requirement, Transwire submits that the Commission's proposals are inadequate to maintain independence between the incumbent LEC and its "separate" affiliate. In order to enforce the structural separation and nondiscrimination obligations against the incumbent LECs, Transwire strongly contends that a level of regulation for the advanced affiliates higher than that for other competitive LECs is justified and necessary during the period of transition to a competitive market.

An incumbent LEC's advanced services affiliate will inherit certain advantages by virtue of its relationship with the incumbent LEC: namely, an established and recognized brand name, operational linkages with its wholesale provider (the incumbent LEC), and an incumbent corporate parent that owns the local network and numerous related enterprises that the advanced services affiliate is likely to employ in developing bundled service offerings to its end user customers. These advantages represent a significant asset that other competitors lack and set the

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general duties of telecommunications carriers in section 251(a) and the obligations of all local exchange

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advanced telecommunications affiliate apart from, and in a more favored position than, its competitors. For these reasons, Transwire believes it is unlikely that the Commission can attain its goal of placing an incumbent LEC's affiliate on the same footing with other competitive LECs.

2. The Commission should prohibit virtual collocation by the affiliate.

Virtual collocation arrangements provide one example of the inherent advantage of an incumbent LECs' advanced services affiliate and the consequent need for increased regulation vis-à-vis other entrants. There are currently no standards for DSL technology. As a result, there are numerous "flavors" of DSL technology, which technologies may or may not be compatible with the incumbent LECs' technology. Compatibility is critical in a virtual collocation arrangement, whereby competitors use the incumbent LECs' end office (or comparable) facilities to provide service. Virtual collocation therefore will benefit only the incumbent LECs' affiliate, whose technology would be invariably compatible with that of the incumbent LEC. As a result of this disparity, Transwire recommends that the Commission prohibit an incumbent LEC's advanced services affiliate from virtually collocating in the incumbent LEC's facilities at least until such time as DSL standards are developed and generally deployed.<sup>33</sup>

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carriers in section 251(b). *NPRM* at ¶ 92 (citing 47 U.S.C. § 251(a) and (b) (1996)).

<sup>33</sup> Moreover, as is discussed more fully in Section III *infra*, in Transwire's view, the lack of technological standards associated with provisioning advanced services renders the concept of virtual collocation for advanced services meaningless. Indeed, this emphasizes the need for absolute access to physical collocation arrangements for advanced telecommunications services.

3. Incumbent LECs should be prohibited from financing the operations of their advanced services affiliates.

A critical question left unanswered by the Commission's "structural separation" proposal is the manner in which the separate affiliate will be funded. Allowing the incumbent LEC to finance the operations of its advanced telecommunications affiliate would certainly provide the advanced services affiliate a leg up on the competition. It was incumbent on "start-up" companies like Transwire to raise the capital and secure the financing necessary to offer advanced telecommunications services on a competitive basis. Therefore, it would be unfair to allow an incumbent LEC's advanced services affiliate access to the vast financial resources of the incumbent LEC. The Commission should therefore prohibit the incumbent LEC from funding the operations of its advanced services affiliate.<sup>34</sup>

4. The Commission should consider the size of the incumbent LEC in implementing its separate affiliate proposal.

Transwire posits that smaller incumbent LECs, such as rural telephone companies or carriers serving a minimal number of the nation's subscriber lines should not be subject to the same separations requirements as the BOCs. Transwire believes that this position is in accordance with the Commission's prior rulings pertaining to the regulation of smaller

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<sup>34</sup> In addition, the advanced services affiliates of incumbent LECs have a strong incentive to favor the incumbent LECs' information services providers to the exclusion of competing providers (thereby raising the possibility of a price squeeze on unaffiliated information service providers). The Commission should therefore impose certain obligations on the advanced services affiliate and the incumbent LECs' information services provider such that competing information service providers are treated in a nondiscriminatory manner.



incumbent LECs.<sup>35</sup> Transwire is committed to serving the rural areas of the country through the deployment of its technology. Transwire hopes that unnecessary regulatory burdens will not impede the provisioning of advanced services technology, such as CDM technology, in rural areas.

5. The Commission should prohibit transfers of facilities from an incumbent LEC to an advanced services affiliate.

An advanced services affiliate that is a successor or assign of the incumbent LEC is subject to the requirements of section 251(c).<sup>36</sup> The Commission therefore seeks comment on how particular transactions between incumbents and their advanced services affiliates should affect the regulatory status of the affiliates.<sup>37</sup> As a general principle, Transwire recommends that only truly *de minimis* transfers -- those which fail to provide the advanced services affiliate with a competitive edge over other competitors -- should be permitted. However, because this is generally a fact-based determination<sup>38</sup> and will be concomitantly difficult to enforce, Transwire

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<sup>35</sup> See, e.g., In the Matter of Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services Implementation of 601(d) of the Telecommunications Act of 1996, WT Docket No. 96-162, Report and Order, FCC 97-352, at ¶ 4 (released October 3, 1997) (exempting rural telephone companies from the requirement of providing commercial mobile radio services through a separate affiliate). See also section 251(f) of the Act, which provides exemptions from the obligations of Section 251(c) for certain rural telephone companies and allows a local exchange carrier with fewer than two percent of the nation's subscriber lines to petition a state Commission for suspension or modification of application of a particular requirement. 47 U.S.C. § 251(f) (1996).

<sup>36</sup> 47 U.S.C. §251(h) (1996).

<sup>37</sup> See *NPRM* at ¶¶ 104-15.

<sup>38</sup> See, e.g., *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 262 n.9 (1974).